United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

74-1313

To be argued by
RAYMOND BERNHARD GRUNEWALD

ORIGINAL

B P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1313

MARTIN F. SOKOLOFF,

Petitioner,

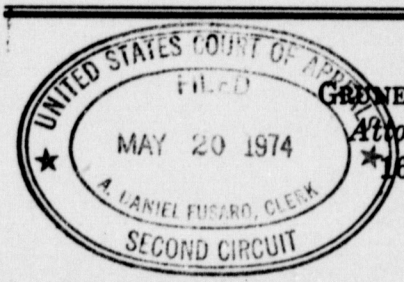
—against—

WILLIAM SAXBE, ATTORNEY GENERAL OF THE UNITED STATES and JOHN R. BARTELS, JR., ADMINISTRATOR, DRUG ENFORCEMENT ADMINISTRATION OF THE DEPARTMENT OF JUSTICE,

Respondents.

ON REVIEW FROM THE DECISION OF THE ADMINISTRATOR OF THE DRUG ENFORCEMENT ADMINISTRATION, DEPARTMENT OF JUSTICE.

BRIEF FOR THE PETITIONER



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Preliminary Statement

On June 12, 1973, Martin F. Sokoloff, M.D. (hereinafter referred to as the "petitioner") entered a plea of *nolo contendere* to felony charges in the United States District Court, Eastern District of New York, before the Honorable Harold R. Tyler, Jr. A minimal fine was the only punishment imposed. On September 29, 1973, an Order to Show Cause was issued by the Drug Enforcement Agency as to why petitioner's Certificate of Registration to dispense controlled substances should not be revoked. After a hear-

ing, on December 11, 1973, Administrative Judge Thomas A. Ricci rendered his findings of fact, conclusions of law and decision. He recommended against revocation. On February 4, 1974 the Administrator of the Drug Enforcement Administration rendered an opinion revoking the registration. On March 8, 1974, petitioner timely filed a petition for review with this Circuit and with the Administrator. (A. 71a).[1]

Questions Presented

(1) Was proof of petitioner's plea of *nolo contendere* to felony charges in a United States District Court admissable in a subsequent civil proceeding under § 824, Title 21, U.S.C., as an admission for the same act?

(2) Does a medical doctor have a right to contest, in a civil proceeding under §824(a) (2), Title 21, U.S.C., his alleged guilt with respect to felony charges, relating to a misuse of a controlled substance, where he had previously entered a plea of *nolo contendere* in a United States District Court?

(3) Must not the Administrator, Drug Enforcement Administration, in accordance with § 824(c), Title 21, U.S.C., prior to acting with respect to an existing Certificate of Registration, hold a hearing to determine facts supportive of suspension for a period of time and not only revocation?

(4) Was the Administrative Law Judge's recommendation-decision binding upon the agency who had submitted the matter to him for a determination on the specific issue of whether or not a Certificate of Registration should be revoked?

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[1] Reference Key: "D.C.R." refers to the District Court Record; "A.H.R." refers to the Administrative Hearing Record; "A." refers to petitioner's appendix.

Statement of Facts

On July 3, 1957, petitioner was duly licensed to practice medicine in New York. He practiced medicine without any unfavorable incident for over fifteen (15) years. On November 9, 1972, petitioner was indicted in the United States District Court, Eastern District of New York. Thereafter, he continued to practice medicine without unfavorable incident. On February 23, 1973, petitioner, as a matter of right[2], in his capacity as a duly licensed physician, in the normal course of events, was duly issued Certificate of Registration AS0725828 by the Bureau of Narcotics and Dangerous Drugs. The Certificate encompassed the prescribing of Schedule II substances.[3] (A. 29a; 65a)

On June 12, 1973, petitioner appeared before United States District Judge Harold R. Tyler, Jr., sitting in the Eastern District of New York. Petitioner withdrew his plea of not guilty and entered a plea of *nolo contendere* to the first three counts of an indictment which charged violations of §§ 841(a) (1), 842(a) (1) and 829(a), Title 21 U.S.C., in that on August 8 and 18, 1972, petitioner had dispensed and distributed amphetamines, a Schedule II controlled substance. No reference to "unlawful, illegal, without authority," etc. was contained in the indictment. (A. 2a-3a) On the same day, pursuant to a pre-plea bargaining agreement with the Court and the government, a presentence report was waived, the petitioner was sentenced to a minimal fine of $250.00 on each count, was placed on an unsupervised probation with a special condition that he not stock amphetamines but that he could prescribe them, and the balance of the indictment was dismissed. While the

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[2] § 823, Title 21, U.S.C. mandates the registration of qualified applicants with respect to controlled substances, subject to specified factors. The factors are not the same as for revocation or suspension pursuant to § 824, Title 21, U.S.C.

[3] Schedule II substances include basic painkillers such as morphine, demerol and dilaudid. (A. 70a.)

District Court stated that it could not guarantee what action, if any, might be taken by regulatory bodies, or that the *nolo contendere* plea would protect petitioner against such possible action, the Court did not recommend that any further action be taken, and made significant observations (DCR 3-15, A. 7a-19a) a portion of which were:

> "I'm inclined to think, however, on the other hand, that a man with your record and military career as a physician deserves considerable positive effect here. I'm also inclined to agree that or think that though this was a bad mistake on your part, it may well have been in some measure well intended.
>
> "Beyond that, I also surmise from everything I can see that a great many representable physicians have indulged in the same practice.
>
> "Ordinarily, under our criminal justice system, the fact that one type of person, such as a physician, happens to get away without being caught is not usually brought into play defensively for a physician, for example, like yourself who was caught, but I do think this kind of consideration becomes relevant to sentence.
>
> "Also, . . . I am satisfied that you will regard this as a bitter lesson and that you will go on to the practice of your chosen profession fully aware of the implications of the seriousness of loss . . ."
>
> * * *
>
> "This court imposes sentence upon you as follows. "Martin Sokoloff, with respect to each of these three counts, the court suspends imposition of sentence and places you on probation for a period of two years. This is to be deemed unsupervised probation."
>
> * * *

"There is also imposed a special condition of probation to wit: that you will agree not to stock amphetamine tablets within your place of practicing medicine during the period of your probation. This is not to say, of course, that as a physician cannot in an appropriate and acceptable circumstance prescribe amphetamines to a patient of yours. The point being, of course, as I indicate, that you not stock the tablets or drug within the confines of your office wherever it may be, presently located or some other location.

"The Court: Doctor, you look like a decent fellow, except for this horrible affair. As long as you are prepared to accept it as a bitter lesson and I'm sure you'll not do this thing again, I'm confident you will continue your days as an effective practitioner and I wish you well in that regard." (D.C.R. 10-15; A. 14a-19a)

Petitioner thereafter continued to practice medicine without unfavorable incident. One hundred and four (104) days later, on September 24, 1973, an Order to Show Cause why the Certificate of Registration previously issued to petitioner should not be *revoked*, because of petitioner's plea of *nolo contendere*, was issued by the Administrator of the Drug Enforcement Administration (hereinafter referred to as the "Administrator") (A. 21a-22a). Pursuant to administrative regulations, an administrative hearing was held, on November 19, 1973, before Administrative Law Judge Thomas A. Ricci, at Washington, D.C. The stated sole purpose of the hearing was to determine whether or not petitioner's registration should be *revoked*. (A.H.R. 4; 7; A. 30a; 33a; A. 21a; 23a)

The Administrator's evidence at the hearing consisted, essentially, of a copy of the indictment pursuant to which petitioner had pleaded *nolo contendere*, together with the Judgment and Order of the United States District Court. (A.H.R. 3-7; A. 29a-33a; A. 55a-56a)

The Administrator contended that the petitioner's plea of *nolo contendere* would be sufficient to warrant action under § 304(a) (2), Controlled Substances Act (§ 824(a) (2), Title 21 U.S.C.)[4] He rested his case on this assumption. (A.H.R. 8-9; A. 34a-35a; 55a-56a). Petitioner disputed this and contended that the plea of *nolo contendere* did not admit anything for the purposes of an administrative determination as to the invalidation of the registration certificate and that, accordingly, the Administrator's proof was insufficient absent a full evidentiary hearing that established, independently, reason why a certificate should not remain in force. (A.H.R. 15-21; A. 41a-47a; 56a-57a).

On December 11, 1973, Administrative Law Judge Ricci rendered his opinion. He found that the *nolo contendere* plea "resulted in the *substantial equivalent* of a criminal conviction and that therefore the registrant's license may lawfully be revoked." [Emphasis supplied] (A. 56a) Nevertheless he made the recommended decision, under the facts and circumstances of the case, that the ". . . Attorney General not revoke the registration certificate in this case." (A. 60a-61a)

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[4] § 824(a)(2), Title 21 U.S.C., provides, in pertinent part:
"(a) A registration . . . to distribute, or dispense a controlled substance may be suspended or revoked by the Attorney General upon a finding that the registrant—

* * *

(2) has been convicted of a felony . . . relating to any substance defined in this subchapter as a controlled substance . . ."

Petitioner continued his practice of medicine without unfavorable incident. On February 4, 1974, effective February 8, 1974, the Administrator brushed aside the observations and determination of the District Court and the recommendation-decision of the Administrative Judge and revoked petitioner's registration with the notation that, in the event of reapplication, prompt consideration would be given to the granting of such application limited to Schedules III, IV and V of the Controlled Substances Act. (A. 65a-66a) A re-application, for a Certificate of Registration, dated January 16, 1974, was mislaid by the Administrator's office. A request to the Administrator for a stay pending appeal was denied. (A. 63a-64a; 67a-69a) A subsequent application for registration, dated March 11, 1974, for Schedule II, III, IV and V Controlled Substances was granted, with the same registration number, on April 2, 1974, but only as to Schedule III N, IV and V substances. (A. 72a-77a) In order to obtain the Certificate of Registration for Schedule III, III N, IV and V substances, petitioner was required to "modify" his request. (A. 75a-76a) Although crippled by the inability to prescribe or utilize Schedule II substances, petitioner continues to practice medicine without incident. (A. 68a; 70a)

POINT I

A conviction in a Federal Court pursuant to a plea of *nolo contendere* to charges in an indictment is not admissable in a subsequent civil administrative proceeding or determination as proof of guilt of the events to which the plea was entered and any adverse civil determination based solely thereon must be nullified as unsupported in fact and law.

Rule 11, Federal Rules of Criminal Procedure, provides:

> "A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. . . . The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

Several things are self-evident from the rule itself:

(1) a definite distinction is drawn between a plea of guilty and a plea of *nolo contendere*:

(2) Unlike a plea of guilty, there is no requirement that the court be satisfied that there is a factual basis for the plea.

With these premises it is apparent that a plea of *nolo contendere* is not a plea of guilty, that it is something special and apart, and is recognized as such.

Respondent relies solely upon petitioner's *nolo contendere* conviction as a legal basis to justify the revocation of peti-

tioner's Certificate of Registration and, as a practical matter upon petitioner's re-application, to justify the denial of a Certificate of Registration with respect to Schedule II substances, both narcotic and non-narcotic. See, *Petitioner's Statement of Facts*, at pp. 6-7 (A. 65a-68a; A. 75a-77a)

The plea of *nolo contendere*, no longer used in England, was a creature of the early English common law. It involved a bargain between the court and the defendant by which the latter would enter the plea in return for a promise that a fine would be the only punishment.[5] Evolution has resulted in the sanctioning of the imposition of imprisonment as well. *Hudson* v. *United States*, 47 S.Ct. 127 (1926). However, the United States Supreme Court stated, with respect to the plea of *nolo contendere*:

> "The text states the rule of law that has never been questioned that the implied confession, as contrasted to the expressed confession, does not estop the defendant to plead and prove his innocence in a civil action." *Id* at 129.

See, also, *United States* v. *Jones*, 119 F. Supp. 288, 290 (S.D.Cal. 1954).

The term "*nolo contendere*" means, literally, "I will not contest it". It has

> ". . . the same legal effect as a plea of guilty, *so far as regards all proceedings on the indictment and on which the defendant may be sentenced.*"[6] [Emphasis supplied]

---

[5] See Federal Rules of Criminal Procedure, N.Y.U. Institute (1946) 162. The history of the plea is reviewed by the Advisory Committee in its Note to the 1971 Proposed Amendments to Rule 11.

[6] Black's Law Dictionary, Revised Fourth Ed. 1968.

Federal Courts have repeatedly held that a plea of *nolo contendere* is an admission of guilt only for the purpose of the particular criminal case in which it is entered and cannot be used as an admission in a civil case for the same act. Moreover, a defendant who has entered a *nolo contendere* plea is not estopped, in a subsequent civil proceeding, from controverting facts upon which the prosecution was based. See, *United States* v. *Lair*, 195 F. 47, 52 (8th Cir. 1912); *United States* v. *Jones*, *ibid*; *Twin Parts Oil Co.* v. *Pure Oil Co.*, 26 F. Supp. 366 (D.C. Minn. 1939). In *Twin Parts*, at 376, it was held that entry of a *nolo contendere* plea in a Clayton Anti-Trust Act criminal case was neither an admission or estoppel where the defendant was subsequently sued for civil damages for alleged anti-trust conspiracy. The court there observed that:

> ". . . a plea of nolo contendere is an admission of guilt only for the purpose of the case . . ." and that ". . . it cannot be used as an admission in a civil case for the same act." [citing, *inter alia*, *Hudson* v. *United States*, 272 U.S. 451]

The same principle has been applied to a proceeding under 26 U.S.C. (I.R.C. 1939) §3253 for forfeiture of an automobile and liquor for failure to pay tax. A plea of *nolo contendere* in a prosecution for failure to pay the tax could not be considered in disposing of the issues in the subsequent forfeiture proceedings. See, *United States* v. *One Chevrolet Stylemaster Sedan*, 91 F. Supp. 277 (D.C. Colo. 1950).

The administrative court in the instance case, a hearing unquestionably civil in jurisdiction, contended:

> ". . . that the nolo contendere plea in this case resulted in the substantial equivalent of a criminal conviction and therefore the registrant's license may be lawfully revoked." (A. 56a).

But the finding that a plea of *nolo contendere* is the "substantial equivalent of a criminal conviction" does not satisfy the requirements of the statute. The statutory requirement is that there be a finding, based on affirmative *admissible* proof, that there was a conviction of a felony *and* that the felony conviction be related to a controlled substance. § 824(a), Title 21, U.S.C. In making that finding the administrative judge used the *nolo contendere* plea as an admission of guilt with respect to a felony charge and to the facts contained in that charge.

Inherent in the administrative judge's findings, certainly in the view of the Administrator, was that the application for renewal or its equivalent, would be subject to that finding and would be dealt with accordingly. As a practical matter it has been. (A. 60a; 65a-67a; 73a-77a)

Conceding that ". . . the doctor's defense rests upon the unassailable contention that so long as a criminal defendant is permitted to choose between a plea of guilty and one of *nolo contendere*, a difference between the two there must be . . ." the administrative court nevertheless drew a distinction, unfavorable to the petitioner, based upon its interpretation of *Tseung Chu* v. *Cornell*, 247 F.2d 929 (9th Cir. 1957). It is respectfully contended that such reliance was misplaced and that the converse is true, *i.e.* the case is supportive of petitioner's position.

In *Tseung Chu*, Mr. Chu had been convicted on his plea of *nolo contendere* to a charge of wilfully, knowingly, unlawfully and feloniously attempting to evade and defeat his income taxes. In a subsequent application for a visa Mr. Chu answered "none" to the question: "I have never been arrested, convicted . . ." An order of deportation was contested. But the issue turned on the failure of Chu to disclose the conviction for a crime involving moral turpitude. In

essence, while the plea of *nolo contendere* was restricted to the case itself and not useable in other proceedings as proof of the particulars of the crime pleaded to, it did not give Mr. Chu the right to deny the conviction's existence nor the fact that it dealt with a crime, the nature of which fell within the purview of the prohibitions of the Immigration and Naturalization Laws. Thus the Court in *Tseung Chu* analysed:

> "Appellant was not asked on his application for visa if he was or was not guilty of any crime; nor if he had or had not plead guilty to a crime. He was asked if he had ever been convicted. It was to this that his answer was "none." It was this that was false."

However the Court in *Tseung Chu* was careful to note, what is the law (and consistent with petitioner's position):

> "The plea of *nolo contendere* when accepted by the court, becomes for all practical purposes, 'the full equivalent of a plea of guilty,' Farrington v. King, 8 Cir., 128 F.2d 785, 786, but distinguishable from that plea 'in that it cannot be used against the defendant as an admission *in any civil suit for the same act.*' (Emphasis added.) Tucker v. United States, 7 Cir., 1912 196 F. 260, 262.
>
> If plaintiff were sued civilly for his income tax deficiency, he could with propriety have objected to the introduction of the plea of nolo contendere as any admission on his part that he did defraud the government. The plea cannot be used to prove he did defraud the government. It can be used to prove he did not answer the question truthfully, when, asked if he had ever been convicted, he replied that

> he had not. The question went to, and his answer included, conviction in *any case*, including the one to which he had entered a nolo plea, 'the equivalent of a guilty plea in that case, for all practical purposes.' Cf. Twin Ports Oil Co. v. Pure Oil Co., D.C. 1939, 26 F.Supp. 366, 376, and cases cited and discussed; United States v. Jones, D.C., 1954, 119 F. Supp. 288, 290."

To phrase it another way, while it is one thing to say that a conviction on a plea of *nolo contendere* is not admissible as evidentiary and conclusive proof of the conviction in another proceeding and the facts of the charge pleaded to, it is quite another thing to contend that you can lie about the physical existence of the plea and conviction. Nor does it mean that a court can not look at the crime pleaded to and determine if it was of the nature and type which was required to be disclosed and thus material. *Tseung Chu, id* at 931.

In *United States* v. *American Radiator & Standard Sanitary Corporation et al*, 288 F.Supp. 696 (W.D. Pa. 1968), the issue was whether or not a plea of *nolo contendere* could be accepted. In discussing the plea offer of the defendants the Court analyzed "*nolo contendere*" at p. 700:

> "However, there is a difference between the pleas. A plea of guilty once accepted is tantamount to a conviction. United States v. Ptomey & Young, 366 F.2d 759, C.A. 3, 1966; Hudgins v. United States, 340 F.2d 391, C.A. 3, 1965. But a plea of nolo contendere even though accepted is only an admission of guilt on the facts of the case as set forth in the indictment for the purpose of the case. Lott v. United States, supra; Bell v. Commissioner of Internal Revenue, 320 F.2d 953, C.A. 8, 1963; Tseung Chu

v. Cornell, 247 F.2d 929, C.A. 9, 1957, cert. den. 78 S.Ct. 265, 355 U.S. 892, 2 L.Ed.2d 190; Mickler v. Fahs, 243 F.2d 515, C.A. 5, 1957.

[3] While in Hudson v. United States, 272 U.S. 451, 47 S.Ct. 127, 71 L.Ed. 347, 1926, the Supreme Court has held that a plea of nolo contendere is a declaration by the accused that he will not contest the charge against him, and that he pleads guilty for the purpose of the case, it is, nevertheless, not a final decree and is subject to an attack even after sentence as in the case of a conviction. United States v. Frankfort Distilleries, 324 U.S. 293, 65 S.Ct. 661, 89 L.Ed. 951, 1945; Lott v. United States, supra. In Lott, 367 U.S. at page 426, 81 S.Ct. at page 1567, it was said:

> 'although it is said that a plea of *nolo contendere* means literally "I do not contest it," Piassick v. United States, 5 Cir. 253 F.2d 658, 661, and "is a mere statement of unwillingness to contest and no more," Mickler v. Fahs, 5 Cir., 243 F.2d 515, 517, it does admit "every essential element of the offense [that is] well pleaded in the charge." United States v. Lair, 195 F. 47, 52 (C.A. 8th Cir.). Cf. United States v. Frankfort Distilleries, 324 U.S. 293, 296, 65 S.Ct. 661, 89 L.Ed. 951. Hence, it is tantamount to "an admission of guilt for the purposes of the case," Hudson v. United States, 272 U.S. 451, 455, 47 S.Ct. 127, 71 L.Ed. 347, and "nothing is left but to render judgment, for the obvious reason that in the fact of the plea no issue of fact exists, and none can be made while the plea remains of record," United States v. Norris, 281 U.S. 619, 623, 50 S.Ct. 424, 425, 74 L.Ed. 1076. Yet the plea itself does not constitute

> a conviction nor hence a "determination of guilt." It is only a confession of the well-pleaded facts in the charge. It does not dispose of the case. It is still up to the court "to render judgment" thereon. United States v. Norris, supra, 281 U.S. at page 623, 50 S.Ct. [424] at page 425.'

Petitioner does not dispute the existence of his plea of *nolo contendere*. He does not attack its limited effect with respect to its being an admission of guilt for the purposes of disposition in the District Court, or what are the words of the charge to which the limited plea was entered. But he does contend that his plea was a mere statement of unwillingness to contest in the District Court and no more. On that basis petitioner confessed no fact underlying the conviction which was material and germane to subsequent administrative law proceedings or which could have been lawfully employed by the Administrator in his determination and order. More affirmatively, petitioner contested all underlying facts essential to supporting an adverse determination. (A.H.R. 15-25; A. 41a-51a; A 56a-57a)

Even where Congress has seen fit to narrowly circumscribe the judicial review (as in orders of the Securities & Exchange Commission) the United States Supreme Court, in *Securities Exchange Commission* v. *Chenery Corp. et al.*, 63 S.Ct. 454, 462 (1943), has stated:

> ". . . the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review. If the action rests upon an administrative determination-an exercise of judgment in an area which Congress has entrusted to the agency-of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do

> so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law. In either event the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained. 'The administrative process will best be vindicated by clarity in its exercise.' Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177, 197, 61 S.Ct. 845, 853, 85 L.Ed. 1271, 133 A.L.R. 1217. What was said in that case is equally applicable here: 'We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board.' Ibid. Compare United States v. Carolina Carriers Corp., 315 U.S. 475, 488, 490, 62 S.Ct. 722, 729, 730, 86 L.Ed. 971. In finding that the Commission's order cannot be sustained, we are not imposing any trammels on its powers. We are not enforcing formal requirements. We are not suggesting that the Commission must justify its exercise of administrative discretion in any particular manner or with artistic refinement. We are not sticking in the bark of words. We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."

The Administrator has misconceived the law and his administrative order cannot be sustained. The grounds upon which he acted were not those upon which they could be

sustained. Acceptance of proof of a plea of *nolo contendere* in a civil proceedings as an admission for the same act, *i.e.* conviction ". . . of a felony . . . relating to any . . . controlled substance," as spelled out in § 824(a) (2), Title 21 U.S.C., it is submitted, is mis-acceptance of a disputed fact deliberately never admitted to by the petitioner except within the limited four walls of the jurisdiction in which it was accepted as such. Such a misconception of the law mandates reversal. *Securities Exchange Commission* v. *Chenery Corp. et al., ibid.*

POINT II

The Administrator, Drug Enforcement Administration, failed to adhere to statutory directions and, accordingly, his order is invalid for denial of due process to petitioner.

Validly promulgated regulations bind the government as much as the individuals subject to the regulation; and this is no less so because the governmental action is essentially discretionary in nature. *Hammond* v. *Lenfest*, 398 F.2d 705 (2d Cir. 1968).

Indeed, the statutory provisions of § 877, Title 21, U.S.C.,[7] do not, as a statement of policy, suggest that the federal court, in appropriate circumstances, cannot inquire whether the agency determination is indeed in accordance with facts and guidelines. See, *Hammond* v. *Lenfest, id* at 715.

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[7] § 877, Title 21, U.S.C., provides:

"All final determinations, findings and conclusions of the Attorney General under this subchapter shall be final and conclusive decisions of the matters involved, except that any person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals. . . Findings of fact by the Attorney General, if supported by substantial evidence, shall be conclusive."

Petitioner is, unquestionably, a "person aggrieved" within the meaning of §877, Title 21, U.S.C., since his ability to practice medicine is substantially impaired by the Administrator's denial of his right to lawfully prescribe Schedule II drugs which encompass rudimentary pain-killers and emergency aids. (A. 60a; 68a-70a)

§824, Title 21, U.S.C., the statutory authority under which the administrative proceeding had been brought (A. 21a; 54a), authorized the United States Attorney General to suspend or revoke a registration "*upon a finding* that the registrant— . . . has been convicted of a felony . . . relating to any . . . controlled substance." [Emphasis supplied] § 824(b), Title 21, U.S.C.

§824(b), Title 21 U.S.C., provides that the Attorney General may limit revocation or suspension to the particular controlled substance with respect to which grounds for revocation or supervision exist.

§824(c), Title 21 U.S.C., provides a safeguard, that "[b]efore taking action. . ." the Attorney General "*shall* serve . . . an order to show cause why registration should not be denied, revoked or *suspended.*" [Emphasis supplied]

When the order to show cause in the instant case was issued and served it provided only that the petitioner should show cause why his registration should not be "*revoked*" because of his *nolo contendere* plea. No option was provided to the Administrative Law Judge for the petitioner to make a showing, or that the administrative court should or could make findings why petitioner's registration should only be suspended or that, if suspended, whether it should be in whole or only in part, for what period of time and that it should not be denied forever. In this regard, in restricting the options available, the agency did not follow its own procedural rules and safeguards for petitioner.

§824(c), Title 21, U.S.C., further provides that proceedings are to be in accordance with Subchapter II, Chapter 5, of Title 5, U.S.C. and are "*independent* of . . . criminal prosecutions or proceedings" [Emphasis supplied] held pursuant to this subchapter or any other law. This would seem to lend even greater impetus to Point I, petitioner's brief. The administrator's reliance solely upon inadmissible evidence of the result of a separate criminal proceeding would seem to be plainly contrary to his own regulations.

§554, Subchapter II, Title 5, U.S.C. further provides: "(a) the agency shall give all interested parties opportunity for—

> "(1) the submission and consideration of facts, arguments, offers of settlement . . . when time, the nature of the proceeding, and the public interest permit; and
>
> (2) to the extent that the parties are unable to do so to determine a controversy by consent, hearing and decision or notice and in accordance with section 556 and 557 of this title.
>
> (d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision. . ."

It is submitted that neither §554(a) nor §554(d) was adhered to since petitioner was precluded from contesting guilt of the charge and the gravamen of the charges contained in the indictment to which he had entered the noncivilly binding plea of *nolo contendere.* It is further submitted that by its own order to show cause the Drug Enforcement Administration noted that ". . . *the purpose of this hearing is to determine* whether or not a doctor's regis-

tration should be revoked . . ." [Emphasis supplied] (A. 21a) Thus the thrust was not just to have a hearing to merely make a recommendation but, in fact, a hearing that was to be determinative of the ultimate decision. This would seem to be the effect when §§ 554, 556 and 557, Title 5, U.S.C., are read together.

§557(b), Title 5, U.S.C., provides in part:

> "(b) When the agency did not preside at the reception of the evidence, the presiding employee . . . shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee . . . [in this instance the Administrative Law Judge requested by the agency] . . . makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by the rule."

§ 557(b), Title 21, U.S.C. does not appear to have been complied with, for nowhere does it appear, that such was done. The Administrative Law Judge rendered his decision, assumed he could only recommend and, without any appeal or review requested or referred to in the Administrator's order, the decision was modified and only partially adopted by the Administrator.

Furthermore, in arriving at his determination to revoke registration, the Administrator appears to have applied a criteria not specified in § 824 (the revocation section), albeit specified in § 823(e), (the registration section) namely, "inimicable to the public health and safety." (A. 66a-67a) This would also appeal to be totally inconsistent with the position taken by the Administrator at

the time he instituted the proceeding, for although he had the discretionary power to do so, he did not suspend petitioner's registration because of any finding that petitioner constituted an imminent danger to public health or safety. See, § 824(d), Title 21, U.S.C.

Lastly, it is submitted, that there has been no ". . . findings of fact by the Attorney General . . ." (or the Administrator, as his duly authorized representative) as set forth in § 877, Title 21, U.S.C. No reference is made in the Administrator's order to specific findings of fact although comment is made on findings of fact, conclusions of law and recommendations of the United States District Court and the Administrative Law Judge, and an "opinion" is rendered.

The Administrator, Drug Enforcement Administration, thus failed to follow specific statutory directions. As a result, petitioner was relegated to contesting only the issue of whether or not his Certificate of Registration for Schedule II, III, IV, V and VI drugs should be revoked. He was deprived of his right to demonstrate, and the Administrative Law Judge of his right to conclusively determine, whether or not all or only part of the registration should be suspended, if anything was suspended, on what basis, upon what terms and for what reasonable period of time. Without such a factual basis established, the Administrator's flat revocation as to Schedule II (both narcotic and non-narcotic) was arbitrary and capricious, constituted an abuse of discretion and an unconstitutional deprivation of property without due process of law.

CONCLUSION

The revocation, by the Administrator, Drug Enforcement Administration, of Petitioner's Certificate of Registration was based upon a misconception of law and fact, the Administrator failed to follow his own administrative regulations to the detriment of petitioner, and the order or revocation must be rescinded as contrary to law and fact. The Administrator should be directed to issue to petitioner a Certificate of Registration as to Schedule II, as well as Schedule III, III N, IV and V controlled substances, forthwith.

In the alternative, the Administrator should be directed to abide by his administrative judge's decision or, for failure to otherwise adhere to statutory directions, be required to hold a hearing on the issue of appropriateness with respect to suspension for a reasonable period of time, as to Schedule II substances, rather than only revocation or denial.

Respectfully submitted,

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AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Monroe Rosen being duly sworn, says that on the 20th day of May, 1974, he served 2 Copies of the annexed Petitioner's Brief upon Hon. John R. Bartels, Jr. Esq., the attorney for the Respondents herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at 150 Christopher Street, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at ~~No.~~ Drug Enforcement Administration, Dept. of Justice in ~~the Borough of~~ Washington, D.C., ~~City of New York~~, being the address within the State therefore designated by him for that purpose.

Monroe Rosen

Sworn to before me, this
20th day of May, 1974

MILTON C. WINKLER
Notary Public, State of New York
No. 31-9704765
Qualified in New York County
Commission Expires March 30, 1976

Service of three (3) copies of the within
is hereby admitted
this day of

.....

Attorney(s) for